Reflection and the Limits of Liability: Necessary Blindness in the Legal System

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The legal system needs to take a good hard look at the concept of responsibility. Whether it is criminal guilt, products liability, or employment discrimination, the legal system is in the business of locating responsible actors and making them answerable for their behavior. Without a robust working understanding of responsibility, the legal system is nothing but an arbitrary exercise of power. Recent philosophical developments suggest a need to re-examine responsibility as it is currently understood in the legal system.

Unfortunately, examining responsibility too closely is problematic because our current understanding, while robust and workable, is conceptually unable to withstand sustained scrutiny. In this essay, I investigate problems in our understanding of responsibility and show how the legal system tolerates those problems. The heart of my argument is that society's conception of responsibility rests on ideas of moral autonomy that insufficiently recognize the role of chance. We cannot solve the problems, however, simply by increasing our recognition of chance, because chance nullifies the requirement of control that undergirds our understanding of responsibility. Rather, we solve the problems by pretending they do not exist. In this essay, I briefly examine the foundations of legal responsibility and discuss why the door to the basement is generally left shut. A little bit of blindness is needed to make the whole system work.

I divide the discussion into two parts. Part I provides the philosophical framework for the analysis. In this section, I emphasize how increasing appreciation of the role of chance in human affairs leads to radical rethinking of our law's idea of responsibility. The old idea of autonomous actors who freely choose actions and intend the consequences is hopelessly inadequate.[1] In its place has come a more sophisticated conception of socially constituted actors whose intentions reflect the influence of other people and whose actions cannot be understood independently of the world in which they occur.[2] The

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[1] The literature on the topic of autonomy is immense and growing daily. An important early critique of this position is MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982). Foundational theories in general are explored very carefully and rejected one by one in BERNARD WILLIAMS, ETHICS AND THE LIMITS OF PHILOSOPHY (1985). I have titled this essay to mimic the tradition of Williams and Sandel. *See also* RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE (1979).

[2] *See, e.g.*, DIANA T. MEYERS, SELF, SOCIETY, AND PERSONAL CHOICE (1989); RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY (1989); MICHAEL WALZER,

intersection of these two sets of ideas yields an irreconcilable conflict between luck and control as criteria of responsibility. The solution to the problem, unsatisfying as it may seem, is never to hold both sets of ideas in one's head at the same time.

In Part II, I become more specific. I examine a number of classic legal cases in order to fill out the philosophical framework. First, I demonstrate how luck and contingency lurk behind issues that are typically considered luck-free. Then I detail how the legal system keeps the fortuitous components in the background in order to prevent the ascription of responsibility from being undermined. As long as fortuity is mitigated, requirements of control are not jeopardized.

I have an ulterior motive, too. Regardless of the outcome of particular arguments, I hope—simply by making the attempt—to demonstrate that certain issues can be addressed fruitfully in terms of luck and chance. The impact of chance tends to be so subtle that it is seldom in the limelight, yet so important not to be disregarded completely. The time has come to move chance off the wings and onto center stage.[3]

I. PHILOSOPHICAL FRAMEWORK

The crux of this essay is a joint thesis about consistency and chance. Each facet of the thesis is a consequence of the recent shift in moral philosophy from a foundationalist perspective to a relativistic one.[4] Before discussing the consequences, I must pause to define my terms. When I refer to a theory as

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INTERPRETATION AND SOCIAL CRITICISM (1987); MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983). For a historically oriented discussion of the question, see DAVID MCLELLAN, IDEOLOGY (1986) and CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF MODERN IDENTITY (1989). For a utilitarian approach to the issue, see BARBARA H. SMITH, CONTINGENCIES OF VALUE: ALTERNATIVE PERSPECTIVES FOR CRITICAL THEORY (1988). The classic gender-oriented study is CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982).

[3] The power of a luck-based analysis is aptly demonstrated by Martha Nussbaum's comprehensive analysis of the treatment of luck in the classical era. MARTHA C. NUSSBAUM, THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY (1986).

[4] *See, e.g.*, STEVEN D. EDWARDS, RELATIVISM, CONCEPTUAL SCHEMES AND CATEGORICAL FRAMEWORKS (1990); RELATIVISM: COGNITIVE AND MORAL (Jack Meiland & Michael Krausz eds., 1982). The relativistic shift has made deep inroads into the legal community, too. *See, e.g.*, James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685 (1985); Pierre Schlag, *Cannibal Moves*, 40 STAN. L. REV. 929 (1988); Joseph W. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984).

foundationalist, I mean it rests on universal truths or foundations that apply to all people at all times. More precisely, these theories posit moral truths whose truth status depends upon facts independent of human thought processes. Thus, anybody who believes the truth of foundational truths is correct, and anybody who denies their truth is mistaken. These theories are often termed objectivist or universalist, and their proponents have included such major figures as Plato, Descartes, Kant, and Mill.

In contrast, relativistic theories deny the existence of universal truths. In one way or another, relativistic theories locate ethics in local and contingent practices that differ from one community to another. From this perspective, the truth of all matters is inextricably linked to the conceptual schemes of human beings; nothing is independent of human thought processes. These points of view are frequently labeled conventionalist or communitarian, and they include among their proponents Richard Rorty, Michael Walzer, and Stanley Fish.

The shift from foundationalism has important consequences on both a large and small scale. On a large scale, it means that ethical principles are socially constructed and subject to change. Ethics becomes the science of describing and projecting patterns of human behavior, rather than the science of discovering pre-existing moral principles. Cultural norms, economic conditions, interactions with foreigners, and infinitely more swirl around in an incredibly complex and factually conditioned social stew. From this stew some widely shared principles can be abstracted. However, the principles do not apply to all members of a society and certainly not to all societies, nor are they invulnerable to change. The important point is that some widely shared principles can be extracted: Killing people is wrong (except for self-defense or enemies in warfare), promises should be kept (unless the costs far outweigh the benefits), and people are responsible for their own behavior (except for coercion or duress). Ethical principles are such general behavioral norms, and ethics is the discipline that deals with them.

On an individual scale, the shift from foundationalism to relativism forces us to look again at personal identity. Foundationalist theories regarded individuals as autonomous, uncaused, morally independent agents. The very fact of humanity gave individuals a special status independent of their social character. Yet contemporary theorists think of identity more contextually. They see people as socially connected and mutually interdependent. Children are raised certain ways, exposed to certain kinds of ideas, and ultimately become certain kinds of people. Their identities down the road, and the actions they choose, are causally related to prior circumstances over which they had no control. Thus, in important ways their identities are products of haphazard processes.

This paradigm shift leads to massive problems of consistency and

coherence that have not been fully explored in either the legal or philosophical community. If ethical principles are understood as rationally necessary or intrinsically human, then one can reasonably expect them to be logically consistent and perhaps even unitary. Their derivation from a single source would cause them to hang together in a certain way. But if ethics is understood relativistically, we have no reason to expect principles to be especially consistent. They may mix and match in a variety of combinations. Unfortunately, our expectations of consistency and unity have followed us into a perspective in which they no longer apply. The results are uncomfortable.

Consider first the individual. The principle of consistency fails to respect individual change over time or the varying imprints left by diverse communities. If people's identities are (even partly) socially constituted, and people are exposed to many different social contexts—one at home, one at school, one earlier, one later—then there is no assurance that different aspects of their identity will be consistent with each other. Different experiences will leave differing imprints. A child may absorb a certain set of basic assumptions in the religious home and a different set of basic assumptions in the secular school yard. Some assumptions, like the existence or nonexistence of God, may be so obvious and so obviously contradictory that the child will someday have to sort them out. More subtle assumptions, like the origins of identity or conditions of responsibility, may never be ferreted out and compared. The child may grow up with diverse and conflicting sets of beliefs that never clash with each other, because those facets of personality are never explicitly called upon at the same place and the same time for the same reason. Thus, the inconsistency may go unnoticed; people may be inconsistently constituted and never know it.[5] I suspect that even the most balanced and introspective

[5] Consider, for example, people's internally inconsistent attitudes toward animals uncovered in PETER SINGER, ANIMAL LIBERATION (2d ed. 1990). The book opens with an anecdote about a woman who boasts of her love for animals while eating a ham sandwich. *Id.* at ii. Later, Singer examines the phenomenon in greater detail:

> Our attitudes to animals begin to form when we are very young, and they are dominated by the fact that we begin to eat meat at an early age. [W]e eat animal flesh long before we are capable of understanding that what we are eating is the dead body of an animal. Thus we never make a conscious, informed decision, free from the bias that accompanies any long-established habit, reinforced by all the pressures of social conformity, to eat animal flesh. At the same time children have a natural love of animals, and our society encourages them to be affectionate toward animals such as dogs and cats and toward cuddly, stuffed toy animals. These facts help to explain the most distinctive characteristic of the attitudes of children in our society to animals—namely, that *rather than having one unified attitude to animals, the child has two conflicting attitudes that coexist, carefully segregated so that the inherent contradiction*

individuals incorporate disparate and subtly inharmonious sets of beliefs. This is not a claim I intend to dwell upon, but I suspect that a call for utter consistency is a call for madness.

The same is true on a larger scale. If our ethical principles are indeed abstracted from the chaos of real world situations and beliefs, they need not be organizable into a single coherent scheme. They are simply stories that help us to arrange and understand a vastly complicated world. If we push the stories hard enough, they begin to unravel. Our moral order cannot withstand sustained demands for consistency or coherence, because it is neither planned nor based on inescapable laws of logic. We can see logical patterns when we look back over the facts, but if we expect too much from the patterns, they fail us. Our ethical beliefs are not prospectively coherent, so we should not expect them to be retrospectively coherent either. Like figures in ink blots, they lose their coherence when examined too closely.

Now I have reached a claim that I intend to dwell upon. The remainder of this essay examines two principles that, considered separately, make sense. However, if the two principles are put together and examined at the same time, they lead to absurd results. Yet our response to the absurdity is not to reject the principles—they are too important for that, too central to our moral understanding. Instead, we find other ways to deal with the problem.

The first principle is the prevalence of chance. The deepest commitment of relativistic ethics is the idea that things could be other than they are. On an individual level, this means that people are fundamentally affected by forces beyond their control. In this essay, I call these external forces luck, fortune, contingency, or chance.[6] People clearly cannot control whether they are born

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between them rarely causes trouble.

Id. at 213–14 (emphasis added).

Another example of socially endemic inconsistency is the old aphorism of political science that Americans are "ideologically conservative but programmatically liberal." In other words, Americans respond to ideological calls for free markets and minimal government while simultaneously demanding long lists of government programs such as food and drug testing, unemployment compensation, highway maintenance, disaster relief, school lunches, workplace safety, and much more. For a recent exploration of this phenomenon, see THOMAS FERGUSON & JOEL ROGERS, RIGHT TURN (1986). For the original formulation, see LLOYD A. FREE & HADLEY CANTRIL, THE POLITICAL BELIEFS OF AMERICANS (1967).

[6] Thomas Nagel defines luck as anything beyond a person's control. *See* THOMAS NAGEL, MORTAL QUESTIONS 26 (1979). Luck need not be beyond anybody's control, just the agent at hand. If a pedestrian on a city street is hit by a stray bullet, the fact that somebody caused the bullet to be fired does not imply that the effect on the individual is anything other than fortuitous. The usage also accords with Aristotle's definition of

black or white, rich or poor, talented or inept; but the significance of this "natural lottery"[7] is overwhelming. Those who are born wealthy or intelligent or into supportive families have advantages from the outset. Those who are born poor or handicapped or into abusive families have constitutive disadvantages that hinder achievement and may even lead them into trouble. Fortune shapes people's genetic composition, the environment of their childhood, and the range of opportunities available to them. It forms people's personalities, molds their dispositions, and defines their choices of action. None of this is under the individual's control.

Even if the constitutive circumstances are identical, chance occurrences in the rest of the world can lead to widely different consequences.[8] Tires may or may not go flat on the way to important appointments, and helpful people may or may not happen by when they are needed. A person may be liable for either homicide or assault depending on whether the victim bleeds to death before the ambulance arrives. One person may apply for a job when it happens to be vacant and another person when it happens to be occupied. As Mother Goose points out, an entire kingdom can be lost for the want of a nail.[9] Much that is

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involuntary action. *See infra* notes 10–12 and accompanying text. The term "luck" is not intended to be precise; it is used "generously, undefinedly, but, I think, comprehensibly." BERNARD WILLIAMS, MORAL LUCK: PHILOSOPHICAL PAPERS, 1973–1980 at 22 (1981). In this essay, terms like "luck," "chance," "fortuity," and "contingency" will be used interchangeably. None of the terms are intended to connote value, as in good luck or bad luck.

[7] The term comes from Rawls. JOHN RAWLS, A THEORY OF JUSTICE 12, 15, 76–80 (1971) (discussing the natural lottery and the difference principle).

[8] Any emphasis on consequences is problematic, because it can be difficult to determine what constitutes a consequence. An action may bring about certain results in the short run, different results in the long run, and still different results in the very long run. In the meantime, all kinds of intervening causes exert distorting effects of their own. In the end, it becomes impossible to determine what the results of an action are and correspondingly impossible to link the moral value of an action to its results. *See, e.g.*, A.N. PRIOR & D.D. RAPHAEL, *The Consequences of Actions*, *in* 30 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY: DREAMS AND SELF KNOWLEDGE 91 (Supp. 1956).

[9] MOTHER GOOSE'S NURSERY RHYMES 191 (Walter Jerrold ed., Alfred A. Knopf Inc. 1993) (1903). The entire rhyme is as follows:

> For want of a nail, the shoe was lost,
> For want of the shoe, the horse was lost,
> For want of the horse, the rider was lost,
> For want of the rider, the battle was lost,
> For want of the battle, the kingdom was lost,
> And all for the want of a horse-shoe nail!

important in life can be traced to consequential fortuities. Such contingencies lurk everywhere and shape the context in which everything must be understood. The sum of these fortuities, both constitutive and consequential, is limitless. They incorporate an entire world of events beyond the agent's control.

The second principle is that fortune relieves responsibility. Responsibility typically rests on autonomous individuals who make their own decisions and control their own behavior. Accidents have long been considered an exculpatory circumstance. Aristotle expressly articulated this idea in 350 B.C. when he said that people are not responsible for involuntary actions,[10] by which he meant anything in which the "moving principle is outside"[11] the actor or caused by circumstances beyond the actor's control. According to Aristotle, the excuse of involuntariness extends equally to what people *do* and what people *are*. People are excused from misdeeds done ignorantly or under compulsion and from fundamental inadequacies of their constitutions.[12] In general, luck relieves responsibility. There is no surer way to absolve oneself of blame than to prove oneself a victim of circumstance.

Yet recognizing the full depth and breadth of fortuity sabotages the idea of moral responsibility. If agents need to be in control to be responsible, and no agent is ever fully in control, then no agent is ever fully responsible. Or to put

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Id.

[10] ARISTOTLE, THE NICOMACHEAN ETHICS, $1153^{b}18$–20 (David Ross trans., 1941). Aristotle is aware of the problems implicit in unreserved recognition of chance. *See id.* at bk. III, ch. 5. Aristotle explicitly excludes fortune from the heart of ethics with a bald ipse dixit: "To entrust to chance what is greatest and most noble would be a very defective arrangement." *Id.* at $1099^{b}24$.

For a general discussion of excusing conditions, see PAUL W. TAYLOR, PRINCIPLES OF ETHICS 146–50 (1975). Any of the traditional excusing conditions—ignorance, coercion, loss of control, or absence of ability or opportunity—can be characterized readily in terms of chance.

[11] ARISTOTLE, *supra* note 10, at $1110^{a}2$.

[12] Ignorance: The man with the catapult was excused when he "let it go off when he merely wanted to show its working . . . ." ARISTOTLE, *supra* note 10, at $1111^{a}11$–12. Compulsion: A ship's captain may blamelessly throw goods overboard in a storm if it is necessary to save ship and crew. *Id.* at $1110^{a}8$–12. Constitution:

> [W]hile no one blames those who are ugly by nature, we blame those who are so owing to want of exercise and care. . [N]o one would reproach a man blind from birth or by disease or from a blow, but rather pity him, while everyone would blame a man who was blind from drunkenness .

Id. at $1114^{a}23$–27.

it differently, if everything is ultimately caused by luck and people are not responsible for luck, then nobody is responsible for anything. Responsibility and voluntariness become meaningless ideas. This problem is the topic of a famous essay by Thomas Nagel called *Moral Luck*.[13] In this essay, Nagel demonstrates our susceptibility to chance and examines our tendency to regard external causes as excuses. He concludes that:

> [T]he broad range of external influences here identified seems on close examination to undermine moral assessment as surely as does the narrower range of familiar excusing conditions. If the condition of control is consistently applied, it threatens to erode most of the moral assessments we find it natural to make. The things for which people are morally judged are determined in more ways than we at first realize by what is beyond their control. And when the seemingly natural requirement of fault or responsibility is applied in light of these facts, it leaves few pre-reflective moral judgements intact. Ultimately, nothing or almost nothing about what a person does seems to be under his control.[14]

On this analysis, the entire domain of moral judgment and personal agency shrinks to an "extensionless point."[15] Choices become ethically equivalent to accidents and people become nothing more than aggregations of external events.[16]

What then to do? The legal system obviously cannot ascribe responsibility at random, but fully appreciating the prevalence of chance proves that ascribing

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[13] NAGEL, *supra* note 6. Nagel's book was a reworking of the essay originally published in B.A.O. WILLIAMS & T. NAGEL, *Moral Luck*, 50 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 137 (Supp. 1976). Williams republished his essay in WILLIAMS, *supra* note 6. Subsequent references to moral luck will be based on Nagel's 1979 version of his essay. Williams is an important figure in this essay too, but I use him more for his insights into the limits of reflection than the prevalence of chance.

[14] NAGEL, *supra* note 6, at 36.

[15] *Id.* at 35.

[16] This theory is similar to its close cousin, determinism. The (hard) determinist argument is that people cannot be held morally responsible for actions beyond their control—in particular, actions performed under compulsion or without choice. Yet every event in the universe is predestined to occur and cannot be altered; every event is either planned by a universal consciousness or is an inevitable link in a chain of cause and effect extending indefinitely to both the past and future. Because people do not freely choose their actions, and also because people cannot be accountable for actions not freely chosen, they cannot be held accountable for anything. For excerpts from classic statements of determinism, see, for example, INTRODUCTORY READINGS IN ETHICS 275–94 (William T. Frankena & John K. Granrose eds., 1974) and INTRODUCTORY READINGS IN PHILOSOPHY 91–107 (Robert R. Ammerman & Marcus G. Singer eds., 1960).

responsibility to agents and actions is deeply arbitrary. Everything that people appear to be directly responsible for is actually a consequence of distant coincidences. There are three ways to deal with this problem. Two potential answers to the question will quickly be considered and dismissed. The third answer, which I believe is correct, will then be developed at length.

The first potential answer to the question is to dismiss it by separating moral responsibility from legal responsibility. One can argue that contingency destroys moral responsibility but leaves legal liability unscathed. Even if chance were freely acknowledged in all its forms, and the entire field of moral responsibility were undermined, only moral aspects of the law would be affected. Regulatory or utilitarian aspects would not be affected. Thus, for instance, the moral force of criminal sanctions would decline but the deterrent force would remain unchanged. If moral luck truly undermined moral responsibility, then the legal response to moral luck would be just as dismissive as the response to determinism.[17] As a practical matter, people must be held legally liable—even if they are not responsible in a deep moral sense.

This answer will not be adopted here. It is too simplistic and it overloads the difference between moral and legal responsibility.[18] Both systems ultimately require attributions of responsibility to make sense—even if the type and consequences of responsibility differ. Simply classifying parties as plaintiffs and defendants implies an attribution of responsibility Each party is linked to and identified with a closed set of behaviors or characteristics.

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[17] The law traditionally rebuffs determinist attempts to undermine responsibility. "[T]he law has been guided by a robust common sense which assumes the freedom of the will as a working hypothesis in the solution of its problems." Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1936); *see also* Morissette v. United States, 342 U.S. 246, 250 n.4 (1951); State v. Macias, 131 P.2d 810, 811–12 (Ariz. 1942).

For an expression of social determinism and an argument for its applicability to criminal law, see CLARENCE DARROW, CRIME AND CRIMINALS: AN ADDRESS DELIVERED TO THE PRISONERS IN THE CHICAGO COUNTY JAIL (1902). Clarence Darrow is rumored to once have argued that his client should not be punished for a crime, because his client was fated to act as he did and the action was therefore involuntary. The judge replied that Darrow may be right, and if so, then it was also fated that the defendant be sentenced to prison. The judge had no choice in the matter.

[18] The argument, however, does raise significant and perplexing questions about the gap between legal and moral responsibility. Legal liability need not correspond perfectly with moral responsibility, but it cannot be too different either: "All legal systems in response either to tradition or to social needs both extend responsibility and cut it off in ways which diverge from the simpler principles of moral blame." H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW 67 (2d ed. 1985). For a discussion of related issues, see, for example, JOEL FEINBERG, *Problematic Responsibility in Law and Morals*, *in* DOING AND DESERVING (1970) and O.W. Holmes, *The Path of the Law*, 10 HARV L. REV. 457 (1897).

A second possible answer is to reject the premise that people are never morally responsible for luck. One can argue that fortune absolves responsibility only in certain circumstances but not in all of them. People are responsible for deeper circumstances but not shallow ones. People are *not* morally responsible for the shallow fortuity of an accidentally broken vase, but they *are* morally responsible for freely chosen actions—even if the actions ultimately rest on deeply hidden fortuities of birth or personality. Seen in this way, the problem of line drawing becomes one of deciding how deep to dig. At some point, one can no longer regard fortuity as an excuse; one must take responsibility for oneself.

Though appealing, this answer also will not be adopted here. It treats moral agency too haphazardly and fails to appreciate how deeply Nagel's ideas contradict the classical paradigm of responsibility. The classical concept of moral agency rests on an uncaused, uncontingent, morally independent self. In contrast, the theory of moral luck insists that identities are causally shaped by contingencies. These two definitions of the self cannot be reconciled.[19] If there is no central core of identity, then the classical concept of moral agency either must be rejected or radically redefined. The compromise solution above does neither and is therefore unsatisfactory. If a person is to be considered a morally responsible agent under the classical paradigm, then the agency must be more than skin deep. It must go all the way to the bone.

The third answer, on which I will elaborate in the following section, is to cheat. As Nagel remarks in his essay, when one stops attending to the subtler aspects of luck, they tend to disappear[20] and one returns to the simple "pre-

[19] Needless to say, not everybody agrees with this claim. There have been many thoughtful attempts to define autonomy in ways that avoid these problems. The central contemporary work is Harry G. Frankfurt, *Freedom of the Will and the Concept of a Person*, 68 J. PHIL. 5 (1971). Frankfurt's idea is to hierarchize people into (at least) two levels: The first level consists of what people want, and the second level is what they want to want. Freedom consists in getting the first layer to act in accordance with the second layer. Gary Watson borrows the idea of hierarchization but separates beliefs from values and argues that freedom consists in getting the motivational system to act in accordance with the valuational system. Gary Watson, *Free Agency*, 72 J. PHIL. 205 (1975). However, these theories, and others like them, fail to consider the sources of values or higher level desires. If the top of the hierarchy is not freely determined, for example, if it is socially contingent, then action in conformity with it seems a cramped definition of freedom. As John Christman says, "[A] person cannot be autonomous at a lower level of desire when those very desires are the result of manipulation further up the hierarchy of preferences." John Christman, *Introduction* to THE INNER CITADEL: ESSAYS ON INDIVIDUAL AUTONOMY 3, 9 (John Christman ed., 1989).

[20] NAGEL, *supra* note 6, at 35.

reflective"[21] state in which fortune absolves moral responsibility. Nagel also observes that moral luck, like other skeptical theories, does not arise from overly strict premises but from the consistent application of ordinary ones.[22] In this case, the premise is that people are not responsible for chance events, and the problem arises from applying the premise to an ever widening sphere of chance. However, Nagel's remark implies that skeptical conclusions may be averted without dismissing the premise altogether, simply by applying the premise inconsistently.

The fundamental reasoning is simple. If consistent application of the premise undermines responsibility, but the concept of responsibility cannot be undermined, then the premise should be applied inconsistently. In other words, the premise that people are not responsible for luck is retained but selectively invoked. Of course, this is not done in an organized manner by a central agency. When I say the legal system does this or that, I do not mean to suggest that an invisible chieftain is making executive decisions. Rather, I am referring to the way many of us think and the way the system, and all the participants in it, are conditioned to deal with the world. As a society, we collectively delude ourselves by masking certain principles at certain times in order to avoid confusing results.

Consider, for example, how we would describe a murder committed by somebody who lived a horribly violent childhood and subsequently developed a hostile and aggressive adult disposition. We do not say, "He is *responsible* for pulling the trigger and he is *responsible* for having a murderous disposition, and he is *responsible* for having been raised in a violent home." We do not use the term responsibility equivalently in all those contexts. Conversely, we do not say, "It was *fortuitous* that he pulled the trigger and *fortuitous* that he was raised in a violent home." That is not how we use the term fortuity. What we say is: "It was *fortuitous* that he was raised in a violent home, but he is *responsible* for choosing to kill." We do not question how responsibility can sit atop fortuity—because as we understand responsibility, it cannot.

There is no algorithm, even in principle, for determining when contingencies will be acknowledged and when they will not. The tension between the requirement of voluntariness and the depth of contingency is real. It cannot be made to go away. It is a fundamental incoherence at the heart of ethics, and it is resolved only by not being recognized.

By advancing this thesis, I am following the lead of philosopher Bernard Williams, who suggests that there are limits to what can be known by philosophical reflection, and that sustained questioning destroys moral

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[21] *Id.* at 26.

[22] *Id.* at 27.

certainty.[23] His argument reverses the classical position that reflection is the path to certainty. Williams particularly doubts whether the institution of blaming could "survive a clear understanding of how it works."[24] This doubt suggests that if the institution is to survive, then it may rely on a certain amount of ignorance or obfuscation.[25] Such effects can be achieved by selectively invoking premises. The question then progresses to how and where the selection takes place.

II. SAYING ONE THING AND MEANING ANOTHER: THE RELATIONSHIP BETWEEN LEGAL LIABILITY AND LUCK

The aim of this part of the essay is to see how the law preserves the institution of blaming by selectively invoking the premise that people are not responsible for luck. On its face, the legal system adopts the premise that people are not liable[26] for luck. If too many factors are found to be beyond a party's control, then liability is not imposed. In tort law, for example, accidents are generally not compensable,[27] and doctrines like proximate cause establish liability by separating events for which an agent is causally responsible from events that are too dominated by fortuity.[28] Moreover, liability may be decreased by contributions from circumstances that the defendant cannot control, such as negligence by the plaintiff or intervening causes. The pattern is followed in both criminal law and contract law, where factors beyond the agent's control may act as mitigating circumstances or excuses to breach. Exceptions like strict liability contravene the general principle of not holding people responsible for luck, and hence, they often seem unfair despite their

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[23] *See* WILLIAMS, *supra* note 6, at 148, 171, 193–94. My position is a cousin of Jerry Frug's claim that legal argument is significantly rhetorical rather than logical. According to Frug, the character of an argument is at least as important as its logic and its premises. Jerry Frug, *Argument as Character*, 40 STAN. L. REV. 869 (1988).

[24] WILLIAMS, *supra* note 6, at 193–94.

[25] Plato, the exemplar of philosophical reflection, was sensitive to these concerns. One of the most puzzling parts of the Republic is the noble or necessary lie. The lie is that people are born with different talents according to a plan or design, not purely at random. Socrates suggests that such a lie is essential to the successful functioning of a society. PLATO, THE REPUBLIC 389b, 414c–16c (Paul Shorey trans., 1982).

[26] The term "liability" is used only for responsibility in a legal context. The term "responsibility" is used to denote moral and legal responsibility in general or moral responsibility in particular. When the distinction is important, the words "moral" or "legal" will be appropriately prefixed to highlight the difference.

[27] *See infra* notes 30–34 and accompanying text.

[28] *See infra* notes 35–49 and accompanying text.

practical justifications.[29] Thus, the law generally accepts the simple, intuitive notion that people are not liable for luck.[30]

Nonetheless, accepting the premise does not require the law to apply it. Fortune may be selectively invoked to meet the demands of a given situation.[31] Consider the case of *Kuhlmann v. Wilson*.[32] In *Kuhlmann*, the police placed an undercover informant in a defendant's prison cell where, after a while, the defendant freely elected to speak with him. The defendant incriminated himself and the statement was admitted at trial. The Supreme Court held that admitting the defendant's statement did not violate the defendant's Sixth Amendment right to counsel. The Court reasoned that the statement was not obtained by state action, but by mere "luck or happenstance."[33] The Court acted as if the defendant just happened to choose to speak, and more importantly, that the State just happened to overhear. Emphasizing the fortuity of the statement's acquisition enabled the Court to admit it, because the State obviously could not be barred from using information that simply fell from the sky. Yet the Court ignored the fact that the police deliberately placed the informant in the cell with the express intent of acquiring information. By shifting attention to the fortuitous components of the event, the Court reduced the event to legal

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[29] *See infra* text accompanying notes 57–70.

[30] For a discussion of how the law treats fortune, see the following: 3 JAMES F STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 310–12 (1983); Tony Honoré, *Responsibility and Luck: The Moral Basis of Strict Liability*, 104 LAW Q. REV 530 (1988); Joseph H. King, Jr., *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 YALE L.J. 1353 (1981); Mark S. Mandell & Susan M. Carlin, *The Value of a Chance: The Evolution and Direction of Chance in Tort Law*, 20 SUFFOLK U. L. REV. 203 (1986); Stephen J. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Result of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497 (1974); Yora M. Shachar, *The Fortuitous Gap in Law and Morality*, 6 CRIM. JUST. ETHICS 12 (1987); J.C. Smith, *The Element of Chance in Criminal Liability*, 1971 CRIM. L. REV. 63; Daniel M. Mandil, Note, *Chance, Freedom, and Criminal Liability*, 87 COLUM. L. REV. 125 (1987).

[31] Note, *The Luck of the Law: Allusions to Fortuity in Legal Discourse*, 102 HARV. L. REV. 1862 (1989). The Note contends that once something is identified as luck, it becomes legally irrelevant. The claim is frequently but not always true—sometimes, as in accidents, luck is the most relevant feature in the lawsuit. Even where luck is not explicitly relevant, it is implicit in concepts that are relevant, such as foreseeability.

[32] 477 U.S. 436 (1986). This discussion stems from the Note, *supra* note 31, where it and related examples are discussed more fully.

[33] 477 U.S. at 459 (quoting Maine v. Moulton, 474 U.S. 159, 176 (1985) (citing United States v. Henry, 447 U.S. 264, 276 (1980) (Powell, J., concurring))). In Maine v. Moulton, 474 U.S. 159 (1985), the situation was identical except the informant actively questioned the defendant. The statements were not admitted because they were said to be obtained by state action and not by luck. *Id.* at 176–77.

insignificance.

This shifting of attention exemplifies the legal solution to problems of responsibility. The law calls attention to fortuity only when it is useful. The law manipulates the premise that parties are not responsible for luck by selectively recognizing luck. When luck is not useful it may be left to disappear on the sidelines. Once luck is obscured, the premise that luck relieves liability is rendered irrelevant. Thus, the law imposes liability by drawing lines between luck that is, and is not, recognized. Unrecognized fortune is treated as if it were not fortune at all. This is the mechanism used to preserve the coherence of the practice of imposing liability. The law selectively invokes the premise that luck relieves liability by alternately recognizing or concealing the presence of fortuity. This process is necessary because if fortuity were consistently recognized then the incoherence would surface and nobody could ever be held responsible for anything.[34]

The following sections are devoted to tracing the recognition and concealment of fortuity in the legal system. These sections are *not* devoted to determining when or why people are held liable, but only to discussing the mechanisms for revealing the decision. The discussion is divided into three parts, corresponding to the three ways the law treats liability and luck. The first two methods relate to the imposition of liability. In the first method, the presence of luck is concealed—certain things that are luck are treated as if they are not luck—and then liability is imposed. In the second method, the presence of luck is openly recognized, but liability is imposed anyway. These two options, recognition and concealment of chance, exhaust the possible stances towards recognition of chance when liability is imposed. If neither of these two options is taken, then there remains the third, default option of not imposing liability. Each of these three options will now be examined in turn.

A. *Method One: Concealing Luck*

The first way to impose liability is to conceal luck by shifting attention to events that reasonably can be characterized as something else. This is desirable because it imposes liability when needed and also maintains the appearance of fairness by adopting the premise that luck relieves people of liability In this scenario, the law must decide when to recognize fortuitous circumstances and when not to recognize them. When liability is needed the event is called, for

[34] As an inconsistency it is far deeper than the selective invocations of maxims and counter maxims detailed in KARL LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 521–35 (1966). This is not a case of selecting rules in order to defend a coherent belief. In this case the belief itself is incoherent.

instance, intentional or caused. When liability is not needed the event is dismissed as chance.

Thus, the law characterizes the line that separates recognized and unrecognized fortune as if it separated luck and nonluck. The law labels one side of the line as fortune and the opposite side as, for instance, causation or intent. But in fact, the line does not divide fortune from causation or intent; the line divides luck from itself. It is simply a line between luck that is more or less obvious, and the only difference is legal recognition. Significantly, luck is rarely mentioned during the analysis. The discussion typically occurs in terms of luck's supposed opposite: Courts ask whether the defendant caused the harm, they do not ask whether the harm stemmed from luck.

Some examples will help to make the argument more concrete. Lines of this kind are drawn in many places, but perhaps nowhere so manifestly as in the tort doctrine of proximate cause. Here the line is drawn case by case in order to determine whether or not a particular outcome was reasonably foreseeable.[35] Yet foreseeability can be characterized as a matter of chance. In terms of chance, the question becomes how much of the outcome resulted from the defendant's action and how much resulted from random unexpected contributions of the outside world. Foreseeable risks can be prevented and therefore controlled. Unforeseeable risks are by definition ungovernable. Proximate cause establishes liability by determining whether the harm was caused by the defendant or by unforeseeable circumstances that the defendant could not control.

In *Petition of Kinsman Transit Co.*,[36] literally a textbook case,[37] a ship was negligently secured to a negligently maintained pier on a stormy evening.[38] The ship broke loose from its moorings and careened down the river, striking two other ships and tearing one of them loose from its moorings.[39] The two stray ships then collided into a negligently lowered drawbridge, destroying it and clogging the narrow river with wreckage so badly that property for miles upstream was damaged by flooding.[40]

The issue was how much of the resulting damage was caused by the defendants,[41] and how much was caused by unforeseeable circumstances.[42] The

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[35] W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 42, at 273 (5th ed. 1984).

[36] 338 F.2d 708 (2d Cir. 1964), *cert. denied*, 380 U.S. 944 (1965).

[37] *See, e.g.*, JAMES HENDERSON & RICHARD PEARSON, THE TORTS PROCESS 562 (3d ed. 1989).

[38] 338 F.2d at 712–13.

[39] *Id.* at 712.

[40] *Id.* at 712–13.

[41] The owners of the first ship, the pier, and the city that controlled the bridge

majority of the court held the defendants liable for all of the harm, but noted that all careless actors will not always be held liable for all the harm they cause.[43] "Somewhere a point will be reached when courts will agree that the link has become too tenuous—that what is claimed to be consequence is only fortuity."[44] The dissent agreed with the majority's analysis, but wanted to draw the line elsewhere.[45] The dissent believed liability should not include damage done by the flood, because there was too great a causal distance between the negligence and the flooding.[46] Too many fortuitous factors, like the rising water level and the addition of the second ship, contributed to the harm to hold the defendants liable for all the damage. The dissent argued that the defendants should not be liable for damage caused by circumstances that so far exceeded their control.[47]

I am going to analyze this case three times in three different ways, each of which is intended to highlight a different way chance is involved in the situation and how the law treats it. The first and second analyses, the models of the inverse proportion and the infinite chain of causation, are similar. They ignore the actors themselves and explore the general context in which the incident occurs. The third analysis, based on human standards, focuses on the actors and examines the role of fortune in a personal context. The third analysis will then be augmented with a similar exploration of *mens rea* in criminal law. All of these analyses emphasize facts that are typically dismissed as irrelevant. Yet relevance is exactly what is at issue. From a more global, contextual perspective, these facts are critical and the legally significant facts are mere details.

The first analysis, based on a model of an inverse proportion, was implicitly adopted by the court in *Kinsman Transit*. Both the majority and dissent acted as if causality and fortuity are inversely proportional, as if causality increases as luck decreases and vice versa. Events like the first ship striking the second ship are causally close to the initial negligence; there is little contribution from fortuity. Events like the flooding are causally distant from the initial negligence; there is considerable contribution from fortuity. From this perspective, a court's job is to find the right place on the spectrum to draw the line. Liability is not imposed when the defendant's causal contribution to the harm becomes too small and the fortuitous factors become too large. At that

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were all joined as defendants. *Id.* at 713.

[42] *Id.* at 721.

[43] *Id.* at 725–26.

[44] *Id.* at 725.

[45] *Id.* at 728.

[46] *Id.*

[47] *Id.*

point, the law declines to assert causality and begins to ascribe luck.

The model of the inverse proportion is convenient but not compelling. It rests on an artificial distinction between fortuity and causality The entire situation in *Kinsman Transit* can be portrayed as an unfortunate aggregation of fortuitous circumstances. The inverse proportion between causality and luck can readily be replaced by a model based on luck alone. Because every cause rests on contingency, everything the model characterizes as caused can be recharacterized as a product of factors beyond the defendants' control. The defendants did not cause the second ship to be placed where it was available to be hit by the first ship, nor did they cause the property that was flooded to be located by the riverfront. They did not cause the storm, the narrowness of the river, or the negligence of the other defendants. But if any factor had been missing, the event would not have occurred, or it would not have been so bad. Thus, the damage was not caused simply by the defendants, but by the chance conglomeration of all the circumstances, from bad weather to personal incompetence. When a court states that a defendant caused a harm, it masks the fortuities that support the cause.

These fortuities are legally irrelevant but are not nonexistent. They provide the setting in which the tort occurs and are utterly essential to its occurrence. The context makes the tort. The difference between negligence and mere carelessness typically hinges on factors the actor cannot control. If the pier had not been poorly maintained then the ship would not have broken free, and the ship's captain would have been merely careless. But the pier *was* poorly maintained, and the ship did break away, so the captain became legally negligent. The law's focus on actors obscures the importance of the setting in which they act. Actors who make identical mistakes in nonidentical situations may produce tragically different results. One actor may frequently make mistakes but never cause a harm. Another actor may make mistakes rarely, but make one at exactly the wrong time and be liable for a tort. That is chance. For carelessness to rise to negligence there must be, at the very least, a plaintiff available to be harmed. In the famous case of *Byrne v. Boadle*,[48] for instance, if a pedestrian had not happened to be standing under the window when the barrel of flour rolled out, there would have been a mess, but no tort.[49] Thus, the difference between liability and nonliability is largely a matter of factors beyond the defendant's control; it is not, as the law claims, simply a matter of what the defendant causes. Nothing is ever caused in the pure sense, although the law acts as if it is. Most factors contributing to the harm are matters of chance.

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[48] 159 Eng. Rep. 299 (Ex. 1863).

[49] *Id.* An analogous fortuity in criminal law is getting caught. Unless the defendant has the bad luck to be caught—and many people never are—criminal law never applies.

The law eliminates such contextual fortuities with the practical and expedient "but for" rule of causation. This rule holds that a defendant causes an event if the event would not have occurred *but for* the defendant's action.[50] William Prosser admits that an "event without millions of causes is simply inconceivable" and endorses the "but for" rule to isolate the legally relevant cause.[51] The rule thus focuses attention on the actor and excludes the context. However, the rule is misleading because the role of chance in creating the tort vastly overbalances the role of the defendant. The choice of one cause—the defendant as the bearer of liability—is profoundly arbitrary. The law seeks to protect plaintiffs from harm they did not cause. Yet to do so imposes harm on defendants for circumstances *they* did not cause. The rule of "but for" causation is thus a double-edged sword. On one hand, the context would not have caused the harm *but for* the action of defendant; on the other hand, the action of the defendant would not have caused the harm *but for* the context; on one hand, the plaintiff would not be hurt *but for* the conduct of the defendant; on the other hand, the defendant would not be liable *but for* the presence of the plaintiff. In a deep sense, harm suffered by the plaintiff is no more arbitrary than the harm suffered by the defendant. The "but for" rule obscures all of this. Two swift syllables condemn most of the world to irrelevance. The law grasps the surface phenomenon and acts as if the rest does not exist.

The law conceals the importance of chance by using the language of causation. Courts typically speak in terms of causes—the term "proximate cause" is an example—without recognizing that causes themselves rest on fortuities. If the defendant is found liable then the causes are trumpeted and the fortuities are ignored. This selection renders irrelevant the premise that luck relieves responsibility. But if the defendant is not found liable, then the language shifts and fortuitous factors are brought into the open. This selection renders the premise determinative. The point established by the doctrine of proximate cause can be described as the place where the law changes from the language of causality to the language of luck. Until that point, fortuitous factors are largely ignored.

A second model of the situation characterizes the consequences of an action as an infinite chain.[52] Justice Andrews expressed this view in his dissent to the famous case, *Palsgraf v. Long Island Railroad.*[53] According to this view, every act sets off a chain of consequences that extends infinitely outward. As Andrews said, "A boy throws a stone into a pond. The ripples spread. The

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[50] KEETON ET AL., *supra* note 35, § 41, at 266.

[51] *Id.*

[52] *See, e.g.*, HART & HONORÉ, *supra* note 18, at 68–73, 100; *see also* PRIOR & RAPHAEL, *supra* note 8.

[53] 162 N.E. 99 (N.Y. 1928).

water level rises. The history of that pond is altered to all eternity "[54] The effect of the act never ends, it simply becomes more and more faint. The law's task is to decide where on the infinite chain to stop imposing liability.

The chain of consequences that resulted from the negligence in *Kinsman Transit* included striking the second ship, destroying the bridge, and flooding the land. For these results the defendants were held liable. The consequences might also include, hypothetically, a commuter who was delayed by the destruction of the bridge, a deal that failed as a result of delay, and a company that floundered as a result of the failure. For these results the defendants would not be liable. The question answered by proximate cause is where to cut off the chain of causation that extends outward toward infinity.

However, the infinite chain of consequences could easily be reversed. Instead of a chain of consequence extending outward toward infinity, the situation can be portrayed as an infinite chain of fortuity extending right up to the event. In the hypothetical scenario, the chain of fortuity would include the commuter who needed the bridge, the deal about to be closed, and the company that relied on the deal. The defendants controlled none of these incidental effects. A court would recognize them as fortuities and not impose liability. More importantly, the actual chain of fortuity in *Kinsman Transit* included, for instance, the location of the second ship, the structural strength of the bridge, and the river's propensity to flood. These fortuities were not recognized. They did not relieve liability even though they were beyond the defendants' control, and even though the tort would not have occurred without them. They were beyond the point at which fortuity was considered an issue and within the range where causality was the concept of choice. Thus, they were deemed irrelevant. Proximate cause can therefore be seen as the doctrine that decides where to stop recognizing the chain of fortuity that extends right up to the event.

None of this is intended to indict the doctrine of proximate cause, but simply to describe it. Proximate cause is needed to determine when liability should be imposed, and it provides the mechanism for balancing considerations such as public policy, legal expedience, and "practical politics."[55]

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[54] *Id.* at 103 (Andrews, J., dissenting).

[55] *Id.* *See also* KEETON ET AL., *supra* note 35, § 41, at 264:

> As a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability. Some boundary must be set to liability for the consequences of any act, upon the basis of some social idea of justice or policy.

Id.

See also HART & HONORÉ, *supra* note 18, at 90. Boundaries on liability for

Traditionally, proximate cause is described as a matter of foreseeability. However, it can also be portrayed as a matter of acknowledging or concealing fortuity. It can be characterized as a debate over when luck will, or will not, be relevant. Because a widely shared belief demands that people not be held liable for luck, the label "luck" must be applied only when people are not held liable. When people are held liable, the label "luck" must not be applied. Labeling events as causal, although they are deeply fortuitous, serves this legal purpose. It makes things manageable and preserves the coherence of imposing liability.

The third analysis of *Kinsman Transit* starts from the point of view of personal abilities and the standards against which people are measured. This analysis probes deeper than the other two. It does not focus on the fortuities of the situation, but the fortuities of the actors. It treats personal qualities in an unusual and disquieting way—as aggregations of chance circumstances.

From this perspective, the most important cause of harm was the critical actors' lack of foresight. The actors did not anticipate and forestall misfortune before it occurred, as reasonable people would have done. That is why they are said to have caused the harm. Yet this cause rests on fortuity too. The actors' inability to meet the reasonable person standard was fortuitous, as was the placement of just these actors in just this situation. The defendants' lack of foresight could be due to any number of unappreciated fortuitous factors, both constitutive and consequential. In *Kinsman Transit*, perhaps the worker who inspected the pier performed poorly because she happened to have the flu. Perhaps the ship's captain was a capable novice who would not have made a mistake if such extraordinary circumstances had not occurred. Perhaps the person who should have raised the bridge was trained all his life not to deviate from the prescribed path and did not want to risk an act of initiative. The point here is not to make excuses, but to highlight the role of chance in creating the disaster. Negligent actors are negligent for a reason, and that reason typically lies beyond the actors' control. It is likely to be a personal quality rooted in the individual's past and shaped by contingencies of upbringing, education, or genetic composition. Furthermore, fortuitous personal inadequacies may only be exposed if a demanding situation happens to arise. Simply saying the actors caused the harm obscures these deeper functions of fortuity. Like proximate cause, it focuses attention on one aspect, which is considered a cause, and veils the fortuities that underlie the cause.

This veil is implicitly contained in the legal standards against which people are measured. As a rule, everybody is measured against the same standard—the

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consequences of negligence "are questions of the law's policy, to be found in the court's conception of what limitations are just and expedient or in accord with the rationale or 'purpose' of legal rules." *Id.*

average reasonable person.[56] Such a uniform standard disregards fortuitous differences in the qualities of the individual. As Justice Holmes said, "[T]he law takes no account of the infinite varieties of temperament, intellect, and education which make the internal character of a given act so different in different men."[57] Here again, the rule is soundly based in public policy, which is set forth convincingly by Justice Holmes.[58] And here again, the decision to disregard fortuity is illustrated by the labels used. The law says the harm was caused by lack of foresight. The law does not search one level deeper and say the harm was caused by a fortuitous mismatch between the fortuitously acquired abilities of the individual and the fortuitously determined demands of the situation. The role of luck is thereby concealed.

Such camouflage is necessary because measuring people against standards that they are congenitally unable to meet may seem unfair. It violates the tendency to excuse people for circumstances over which they have no control. Occasionally, however, the law accommodates this sympathy by adjusting the standard to the peculiarities of an individual or a class of individuals. For example, children are judged against standards that are proportional to their age, and the law even recognizes individual differences between children of the same age.[59] People with formally recognized physical disabilities are also measured against different standards. These exceptions represent an admission that people are shaped by contingencies such as genetic composition, that they are not entirely in control of their personal qualities, and that these considerations should affect their liability. But the law cannot afford to go too far in that direction. The law cannot consider people fundamentally shaped by contingencies unless it abandons the idea of morally responsible agents, which it is unwilling to do. Thus, most individual differences must be ignored.

In sum, focusing on the negligence of the actor obscures a great deal of fortuity because standards of foreseeability conceal the fortuities that comprise the individual. Lowered standards reveal an attempt to match the law with constitutive fortuities. Objective standards represent a legal decision to ignore those fortuities, which makes people liable for chance variations in ability When deciding which standard to use, the law implicitly decides whether or not constitutive fortuities are legally relevant. In making this decision, there is a three-way tension among the ease and simplicity of objective standards, the desire to adjust standards to individual abilities, and a limit as to how far the law can admit that people are shaped in such fundamental ways by fortuities.

A similar suppression occurs in evaluating *mens rea* in criminal law. Here

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[56] KEETON ET AL., *supra* note 35, § 32, at 173–74.

[57] OLIVER W. HOLMES, JR., THE COMMON LAW 108 (1881).

[58] *Id.*

[59] KEETON ET AL., *supra* note 35, § 32, at 179.

issues of agency come forward where they can be seen most plainly. In general, courts consider individuals to be utterly in control of their mental states. Fortuitous factors in the composition of the defendant's mental state are considered irrelevant, despite their importance. Exceptions are sometimes made for narrowly defined factors that affect the degree of the charge or defenses, such as insanity, and luck may be discussed to some extent in these situations. But criminal law predominantly focuses on intentions, and even intentional actions rest on fortuities. These fortuities cannot be recognized.

Consider, for example, an intentional homicide. Underneath the intention hides a world of fortuity. People may murder others only because a certain set of circumstances happens to develop. If the circumstances do not all come together in the necessary way, the murder may not take place. Perhaps the defendant had the bad luck to be raised in a violent household and became accustomed to solving problems by force. Perhaps lately there had been a rash of armed robberies in the neighborhood, so the defendant decided to buy a gun. Perhaps the defendant had just been unfairly fired from work and was frustrated and under financial strain. Perhaps the defendant and victim have long disliked each other and generally try to avoid each other, but on this day they happened to be in the same place at the same time. If all these components come together, a murder results. If one component is excluded, the intent may not have formed or been carried out.[60]

These conditions are irrelevant in determining whether the defendant should be punished. Only *mens rea*, not its causes, is considered. With a few exceptions like self-defense, it is only important *that* the action was chosen, not *why* the action was chosen. Choice is considered to be a fundamental category. The law does not look to see what lurks behind choices. Freely chosen actions are considered to be the paradigm of self-control and are therefore indisputable recipients of praise or blame. As Sanford Kadish says, it is impossible to admit as a "defense to crimes of intention that the defendant couldn't help choosing to act as he did because that's the kind of person *he* is—aggressive, self-centered, brutal and so on[.]"[61] Kadish explains that this defense would "undermine the practice of blaming altogether, in common moral discourse as well as in law."[62] He is exactly right. Revealing the full impact of fortuity has alarming consequences. But, we cannot therefore conclude that fortuity does not have

[60] Joel Feinberg presents a similar example in which consequential luck prevents the murder from taking place. In the example, a dust speck lands on the would-be murderer's nose just as he starts to "burn with rage." As a result of a subsequent sneezing fit, the intention to commit the murder never forms. FEINBERG, *supra* note 18, at 35.

[61] SANFORD H. KADISH, BLAME AND PUNISHMENT: ESSAYS IN THE CRIMINAL LAW 97 (1987).

[62] *Id.*

such a large impact. We can only conclude that there are certain advantages to covering it up. Thus, the law draws a line in which factors that are ultimately beyond the defendant's control are not considered exculpatory—or even relevant. As in proximate cause, the law looks only a certain distance down a causal chain, and then it stops.[63]

Recently there has been some movement towards acknowledging the impact of fortune in such contexts. For instance, in nonjail alternative sentencing, the factors that underlie the freely chosen action may be considered. Judges may design sentences to remedy contingencies of education or upbringing, or personality traits such as addiction. Moreover, Catharine MacKinnon discusses deeply underlying contingencies in her response to Mary Daly's analysis of *suttee*, an Indian practice in which widows immolate themselves upon their dead husband's funeral pyres in grief.[64] Daly complains that Indian women are often drugged, browbeaten, or simply pushed into the fire. Probing further, MacKinnon complains that the "deepest victims" of *suttee* are the women who freely choose to kill themselves because they have been socially conditioned to prefer it.[65] That too is compulsion, but of a deeper, more insidious sort. Yet exposing how supposedly free choices are forged by external factors opens the door to excuses of the kind Kadish envisions. The law cannot go too far in that direction. Recognizing that intentional murders or freely chosen *suttees* are not truly free exposes the imposition of liability to skeptical doubts.

To summarize, legal doctrines conceal a great deal of luck by treating it as if it were not luck. This compromise simultaneously satisfies the legal need for liability and the social inclination not to hold people responsible for circumstances beyond their control. More importantly, it preserves the myth that people are autonomous, fully independent agents. Proximate cause masks fortuity as causality; objective standards disregard fortuitous variations in ability; and *mens rea* virtually denies fortuity's existence. Fortuity plays a dominant role in all these cases, yet it is hidden to advance legal ends.

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[63] One way to view the issue is to focus on the size of the relevant time frame. Differing appraisals of criminality can be reached depending on whether one looks purely at the incident itself or the history leading up to the incident. *See, e.g.*, Mark Kelman, *Strict Liability: An Unorthodox View*, *in* 4 ENCYCLOPEDIA OF CRIME AND JUSTICE 1512, 1516 (Sanford H. Kadish ed., 1983).

[64] Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, *in* 7 SIGNS 538–39 n.56 (1982).

[65] *Id.*

B. *Method Two: Acknowledging Luck But Imposing Responsibility Anyway*

Sometimes the law openly acknowledges the presence of luck but holds the defendant liable anyway. In these cases the law simply overrules the premise that luck relieves responsibility, rather than making the premise appear irrelevant as the method above did. This approach is uncommon because it contravenes the general sentiment that people are not responsible for luck. The outcome often appears unfair, because it creates a mismatch between moral and legal responsibility: People are perceived to be morally innocent but legally liable. However, the approach is justified on policy grounds, such as the overbalancing of small injustices to individuals by larger social interests.

The most obvious example of this approach is strict liability. In torts or crimes for which a defendant is strictly liable, ill fortune is never an excuse.[66] Liability attaches even if the harm were caused by factors the defendant could not control. Classic instances of strict liability include hazardous activities, manufactured products, and public welfare offenses.[67]

For example, in the seminal tort case, *Rylands v. Fletcher*,[68] the defendant was held strictly liable for flood damage when water escaped from his reservoir.[69] The water escaped through a defect in the subsoil that the defendant neither knew of nor caused, and that was completely beyond his control.[70] The court found him free from all blame, yet imposed liability anyway.[71] The court reasoned that the defendant had chosen to collect the water on his land, thus creating a potentially hazardous condition.[72] Consequently, he assumed the risk of its escape for any reason.

Attempts to justify strict liability tend to focus on two grounds.[73] First, as the *Rylands* court stressed,[74] strict liability is morally acceptable because the defendant chose to engage in the activity, and the defendant is being held liable for that choice. Second, a harsh rule is needed to protect individuals jeopardized by the activity.

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[66] KEETON ET AL., *supra* note 35, § 75, at 536.

[67] *Id.* § 78, at 545–59, § 98, at 692–94; Richard G. Singer, *The Resurgence of Mens Rea: III—The Rise and Fall of Strict Criminal Liability*, 30 B.C. L. REV. 337 (1989).

[68] 3 L.R.-E. & I. App. 330 (H.L. 1868).

[69] *Id.* at 337–40.

[70] *Id.* at 337–38.

[71] *Id.* at 339–40.

[72] *Id.*

[73] *E.g.*, KEETON ET AL., *supra* note 35, § 75, at 537.

[74] Rylands v. Fletcher, 3 L.R.-E. & I. App. 330, 339-40 (H.L. 1868).

Despite these justifications, strict liability is often derided as unfair.[75] People are uncomfortable with the idea of imposing liability for harm that was not caused by the defendant, but by circumstances beyond the defendant's control. Yet from the standpoint of moral luck, strict liability is no more or less fair than other legal doctrines. Most legal doctrines decide how much luck to consider on the basis of policies appropriate to their domains. Strict liability does the same thing. It just happens that the appropriate amount of luck to consider in these situations is none whatsoever. The only relevant factor is the defendant's decision to engage in a potentially hazardous activity. The contingency that caused the potential hazard to actualize is irrelevant. But in this world of fortuity, defendants are always held liable for circumstances beyond their control. Strict liability simply does it more straightforwardly than most other doctrines.[76] Otherwise, it is no different at all.

There are other doctrines that blatantly punish people for factors beyond their control and that sometimes arouse a sense of injustice similar to strict liability. The ancient common-law doctrine that ignorance of the law is no excuse penalizes people who do not know the current state of the law [77] The intent is to encourage people to learn and follow the law [78] Yet in the modern world many laws are not intuitively obvious, and therefore it is difficult for ordinary citizens to learn them all. If the ignorance is honest, then the result is simply to punish people for things they did not know and perhaps could not have known. As Sanford Kadish says, it is "tough luck."[79]

The thin-skulled plaintiff doctrine of tort law is another example of the law disregarding the influence of fortuity. Under the thin-skulled plaintiff doctrine, defendants are liable for all the harm caused by a tort, even disproportionate

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[75] *See* Singer, *supra* note 67.

[76] Tony Honoré justifies strict liability by ascribing responsibility to all risks and concluding that being punished purely for bad luck is simply one kind of a risk. Honoré, *supra* note 30, at 530. This argument can be seen as a challenge to the traditional excuse of involuntariness. The challenge succeeds only if risk is resolved into two components: First, people risk having bad luck. Second, people risk that the luck will be of a kind that the law does not excuse. This refinement helps Honoré to explain bad luck for which people are *not* held liable, for instance, harm which they are judged not to have proximately caused. Yet the puzzle of the second step remains: What mechanisms does the law use to convey when luck is excused and when luck is not excused?

[77] *See, e.g.*, People v. Marrero, 507 N.E.2d 1068 (N.Y. 1987). The Model Penal Code preserves the doctrine unless the mistake negates the requisite *mens rea*. MODEL PENAL CODE § 2.04 (1985).

[78] *Marrero*, 507 N.E.2d at 1069 (citing HOLMES, *supra* note 57, at 48).

[79] KADISH, *supra* note 61, at 90. Recall that Aristotle considered ignorance an excusing condition. *See supra* note 12 and accompanying text.

and unforeseeable harm to an unusually fragile plaintiff.[80] The underlying policies are burden-shifting and ease of administration.[81] These policies are reasonable from society's point of view, but from the defendant's point of view the result may seem entirely arbitrary. The tort feasor of a thin-skulled plaintiff may feel that liability has materialized from nowhere: One minute he was playfully kicking a classmate in the leg, the next minute he was indebted for the loss of a limb.[82] The pre-existing malady is a matter of chance, uncaused by the tortfeasor. Yet the tortfeasor becomes liable for it.[83]

The common theme among these situations is defendants being held liable for circumstances beyond their control: defective subsoil, legal decisions, or pre-existing maladies. This may seem harsh, but seemingly milder doctrines like proximate cause have the same effect. The law must continually exclude luck, and some doctrines do it more explicitly than others. Doctrines like proximate cause shift attention away from the fortuities that underlie the cause, while doctrines like strict liability simply impose liability up front. But in all cases, a line must be drawn. Legal needs and public policy motivate decisions about how to deal with the problem of luck.

C. *Method Three: Not Holding People Responsible for Luck*

The final method is simply not to hold people liable for luck. This is the default option: If liability is not imposed by concealing luck or overriding it, then liability is not imposed at all. This approach appears fair because fortune itself is beyond criticism and control. The law abides by its premise by absolving defendants of liability for circumstances beyond their control, even though the plaintiff often suffers tragic (*i.e.*, unfortunate) results.

An obvious instance of this approach is the treatment of accidents in tort law. Nobody is liable for an injury that "was not intended and which, under all the circumstances, could not have been foreseen or prevented by the exercise of reasonable precautions."[84] To hold somebody liable for harm done by a bolt of

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[80] KEETON ET AL., *supra* note 35, § 9, at 39–40.

[81] *Id.* at 40. "[I]t is better for unexpected losses to fall upon the intentional wrongdoer than upon the innocent victim." *Id.*

[82] Vosburg v. Putney, 50 N.W. 403 (Wis. 1891).

[83] The criminal analogue to the thin-skulled plaintiff is a victim who dies when the defendant intended only to wound. In this case, the law holds the defendant liable for the fortuitous result. The converse occurs when the defendant intended to kill but the victim is merely wounded. In this case the defendant is held liable only for the actual result, even though its occurrence was fortuitous. Here the law accepts the consequence of fortuity and does not impose liability beyond the (so-called) nonfortuitous harm.

[84] KEETON ET AL., *supra* note 35, § 29, at 162; *see also* HOLMES, *supra* note 57, at 94

lightning or a surprise flood seems unfair and has no deterrent value.[85] Thus, when the law decides to follow the third option, there is no liability for luck that is explicitly recognized as such.[86]

The language used to describe the situations indicates the choice of this approach. The very term "accident" suggests luck, and the old term "act of God" removed the cause of harm as far from human agency as it could possibly go. The role of chance in strict liability is understood but rarely mentioned explicitly. Courts speak instead of assumed risks or hazardous activities. When courts want to take advantage of the popular tendency to equate fortuity with nonliability, they begin to speak in the language of luck.

In general, legal excuses conform to this approach. In criminal law, for instance, mistakes of fact can be exculpatory.[87] A mistake is a defense to a crime in which defendants act reasonably, but due to circumstances beyond their knowledge or control, something occurs that otherwise would be criminally sanctionable. For example, a defendant would not be liable for shooting somebody who was sitting behind a target at a firing range.[88] The defendant behaved reasonably, and the victim's presence was literally unfortunate. Similarly, in contract law, developments that the defendant cannot control may relieve responsibility for breach of contract.[89] In these cases, the legal outcome accords neatly with a popular sense of justice.

Yet all luck obviously cannot be excused. To excuse all luck would put the law in the absurd position of never holding anybody responsible for anything. Thus, the law must carefully choose when it will employ the third option. Generally it is limited to situations that are both flagrantly accidental and

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(stating "that loss from accident must lie where it falls . . .").

[85] Snyder v. Farmers Irrigation Dist., 61 N.W.2d 557 (Neb. 1953) (flood); Sauer v. Rural Co-op. Power Ass'n, 31 N.W.2d 15 (Minn. 1948) (lightning).

[86] However, courts may still manage to find cause and not recognize the presence of luck. One court, for example, found that a worker's injuries were caused by his work—not an act of God—when he was struck by lightning while working in a coal mine more than one hundred feet underground. Stout v. Elkhorn Co., 160 S.W.2d. 31 (Ky. Ct. App. 1942). Subterranean settling caused by the mining created a crack in the earth's crust that allowed electricity to reach the miner when lightening struck an oak tree on the surface. Obviously, the court was motivated by compensation and burden shifting. But to justify its decision, the court had to portray the incident as causal rather than freakish.

[87] *See, e.g.*, MODEL PENAL CODE § 2.04.

[88] KADISH, *supra* note 61, at 84.

[89] ARTHUR L. CORBIN, CORBIN ON CONTRACTS (one volume ed.) § 1321, at 1090 (1952). Corbin cites to a famous case in which a defendant was not held liable for breaching a contract to deliver a music hall because the hall was destroyed before the scheduled delivery. *Id.* § 1321, at 1090 n.3 (citing Taylor v. Caldwell, 122 Eng. Rep. 309 (K.B. 1863)).

contain no overriding policy reason to impose liability.

To summarize, the law cannot and does not excuse all fortuity. Some chance outcomes are excused (method three); some fortuity straightforwardly leads to liability (method two); some fortuity is submerged or labeled as causation or intent, and then liability is imposed (method one). Decisions about how and when fortuity is treated are made on the grounds appropriate to the situation. There is a constant process of line drawing in order to determine how much luck to recognize and how to handle it. The overarching concern is to maintain the appearance of fairness and the coherence of the institution of blaming. Often this is done by artfully manipulating the premise that people are not responsible for luck by selectively recognizing the presence of chance.

III. CONCLUSION

Many authors—whether in law, philosophy, economics, or whatever—devote attention to the discussion of chance. But very few authors treat chance as a topic of its own or try to integrate the attention it receives in the many fields individually. It seems strange that a topic relevant to so many diverse disciplines, and so important to people's lives, is not given more attention in its own right. I have attempted in this essay to bring chance to the forefront of discussion—to make it a heading of its own rather than a subheading within some other subject. By doing so, I have tried to move beyond the contemporary debate between foundationalist and relativistic ethics. I have stepped firmly into a relativistic viewpoint in order to demonstrate what the world looks like from that perspective. These steps are necessary to show what is at stake in the debate.

The issue I highlighted is consistency. With a relativistic viewpoint comes a commitment to chance at extraordinarily deep levels. Yet responsibility, as we understand it, is linked to control because people are not considered responsible when they are not in control. These two theses are incompatible with each other. The solution, however, is not to abandon or modify one thesis or the other, but to keep each of them and use them inconsistently. This inconsistency is not a lie, but an essential part of human understanding. A little bit of blindness is a healthy thing. To document this idea I have examined one type of inconsistency in detail. Hopefully this will open the door to future discussions of the same kind and lead to a more detailed and informed understanding of the concept of responsibility that undergirds the entire legal system.